

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
HICAP NETWORKS, INC.)	File Nos. 9507932 and 9600033
)	
To Provide 39 GHz Point-to-Point Microwave)	
Service in the Areas of Harrisburg, Pennsylvania,)	
and Palm Springs, California)	

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 2000

Released: September 15, 2000

By the Commission:

1. The Commission has before it an Application for Review filed by HiCap Networks, Inc. (HiCap) on May 10, 2000. HiCap requests reconsideration of an April 10, 2000 *Order*¹ by the Wireless Telecommunications Bureau Public Safety and Private Wireless Division dismissing the above-captioned applications for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.²

2. The Commission has established and affirmed a processing policy concerning 39 GHz channels that includes the dismissal of (a) applications that failed to meet the thirty-day public notice requirement as of November 13, 1995; (b) all new applications, major modification applications and amendments filed on or after November 13, 1995; and (c) applications whose mutual exclusivity was not resolved by December 15, 1995 and amendments resolving mutual exclusivity that were filed on or after December 15, 1995.³ In addition, the Commission's Rules provide for the dismissal of mutually exclusive applications and late-filed competing applications.⁴

3. The above-referenced applications were dismissed because they violated the 39 GHz processing policies. Specifically, the Harrisburg application⁵ was mutually exclusive with several

¹ See HiCap Networks, Inc., *Order on Reconsideration*, DA-794 (WTB PSPWD rel. Apr. 10, 2000).

² See HiCap Networks, Inc., Application for Review (filed May 10, 2000).

³ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18639-45 ¶¶ 83-97 (1997); *aff'd* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12440-51 ¶¶ 19-44 (1999).

⁴ See 47 C.F.R. § 21.31 (b)(2)(i) (1995); 47 C.F.R. § 101.45(b)(2)(i) (disposition of mutually exclusive applications). See also 47 C.F.R. § 1.934 (dismissal of defective applications).

⁵ FCC File No. 9507932.

applications and the mutual exclusivity was not resolved by December 15, 1995. The Palm Springs application⁶ was dismissed because it had not satisfied the thirty-day public notice requirement as of November 13, 1995. In addition, a portion of the Palm Springs application was mutually exclusive with another application and filed well beyond the sixty-day cutoff established by that application. Therefore, we uphold the staff decision for the reasons stated therein. There is no reason to disturb it.

4. In the alternative, HiCap requests a stay of the *Order*,⁷ pending the completion of a multi-party appeal of the 39 GHz policies currently before the United States Circuit Court for the District of Columbia.⁸ To receive a stay of an administrative action a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of stay will not harm the other interested parties, and 4) the grant would serve the public interest.⁹ HiCap argues that a stay of the *Order* would serve the public interest by eliminating the need for duplicative litigation and remove uncertainties as to the availability of the subject frequency assignments with respect to the conflicting rights that may attach as a result of the 39 GHz auction.¹⁰ We disagree.

5. First, the plain language of the test to receive a stay of a Commission action provides that a stay request shall be granted only upon a finding that all four conditions are satisfied.¹¹ Thus, where any one of the four conditions is not satisfied, the subject stay request will not be granted. HiCap fails to address the first three prongs of this test. As a result, HiCap cannot satisfy the requirements for a stay.

6. Second, HiCap argues that the public interest benefits support the grant of a stay in this matter. Again, we disagree. We are not persuaded that HiCap's alleged injuries are sufficient to warrant a stay. In this connection, we note that consolidating this matter with the related proceedings before the court would not be duplicative. Moreover, if HiCap wholly prevails in its judicial appeal of the Commission's decision, then we would "forthwith give effect thereto."¹² Finally, we believe that reinstating HiCap's application would frustrate the underlying 39 GHz proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions."¹³

7. In light of the above, we find that HiCap has not shown any injury warranting injunctive

⁶ FCC File No. 9600033.

⁷ See HiCap Networks, Inc., *Order on Reconsideration*, DA-794 (WTB PSPWD rel. Apr. 10, 2000).

⁸ See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362).

⁹ See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by the *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹⁰ Application for Review at 7.

¹¹ See *Washington Gas v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

¹² See 47 U.S.C. § 402(h).

¹³ *July 29 MO&O*, 14 FCC Rcd at 1437-38; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 12 FCC Rcd 2910, 2917 ¶ 15 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rulemaking and Order*, 11 FCC Rcd 4930, 4988-89 ¶¶ 121-124 (1996).

relief.¹⁴ Accordingly, we deny HiCap's request for a stay of the *Order*.

8. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by HiCap Networks, Inc. on May 10, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁴ *Washington Gas v. FERC*, 758 F.2d at 669.